9-17-2013

State v. Smith Appellant's Brief Dckt. 40767

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TERRY LIN SMITH, Defendant-Appellant.	NO. 40767 ADA COUNTY NO. CR 2012-3840 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE PATRICK H. OWEN
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

JASON C. PINTLER
Deputy State Appellate Public Defender
I.S.B. #6661
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUES PRESENTED ON APPEAL 4

ARGUMENT 5

I. This Court Should Vacate Mr. Smith's Conviction For Unlawful Penetration By A Foreign Object Because There Was Insufficient Evidence To Support The Conviction 5

A. Introduction 5

B. A Conviction Founded Upon Insufficient Evidence Violates A Defendant's Right To Due Process Of Law And Must Be Vacated 5

C. A Violation Of I.C. § 18-6608 Under The Use Of Force Theory Requires The State To Prove The Defendant Used An Amount Of Force Beyond That Necessary To Accomplish Penetration 6

D. The State Presented Insufficient Evidence To Sustain A Jury Finding That Mr. Smith Used An Amount Of Force Greater Than The Amount Of Force Inherent In The Act Of Penetration Itself 9

II. The District Court Abused Its Discretion By Imposing An Excessive Sentence 11

CONCLUSION 13

CERTIFICATE OF MAILING 14

TABLE OF AUTHORITIES

Cases

De Jonge v. State of Oregon, 299 U.S. 353 (1937).....6

Hecla Mining Co. v. Idaho State Tax Comm'n, 108 Idaho 147 (1995).....8

Jackson v. Virginia, 433 U.S. 307 (1979).....6

State v. Broadhead, 120 Idaho 141 (1991).....12

State v. Brown, 121 Idaho 385 (1992).....12

State v. Coassolo, 136 Idaho 138 (2001).....12

State v. Cotton, 100 Idaho 573 (1979).....12

State v. Elias, 2013 Opinion No. 43, p.6 (Ct. App. July 12, 2013).....7, 8, 11

State v. Faught, 127 Idaho 873 (1995).....6

State v. Jackson, 130 Idaho 293 (1997).....12

State v. Jones, 154 Idaho 412 (2013).....7, 8, 11

State v. McKnight, 774 P.2d 532 (Wash. App. 1989).....7, 8

State v. Reinke, 103 Idaho 771 (Ct. App. 1982).....12

State v. Shideler, 103 Idaho 593 (1982).....13

State v. Warburton, 145 Idaho 760 (Ct. App. 2008).....6

State v. Wolfe, 99 Idaho 382 (1978).....12

Thompson v. City of Louisville, 362 U.S. 199 (1960).....6

Statutes

I.C. § 18-6101.....7, 8, 11

I.C. § 18-6608.....5, 6, 8

Constitutional Provisions

U.S. Const. Amd. XIV.....5

STATEMENT OF THE CASE

Nature of the Case

A jury found Terry Smith guilty of four counts of lewd conduct with a minor under sixteen, and one count each of sexual battery of a minor child sixteen or seventeen years of age, sexual abuse of a minor under the age of sixteen, and forcible sexual penetration by use of a foreign object. Mr. Smith asserts that there was insufficient evidence to support the jury's finding that he was guilty of forcible sexual penetration by use of a foreign object because the State failed to present any evidence that he used extrinsic force, i.e., force greater than necessary to commit the act of penetration itself. Furthermore, Mr. Smith asserts that the district court abused its discretion by imposing excessive sentences of 20 years, with 10 years fixed, on each count to run concurrently with each other.

Statement of the Facts and Course of Proceedings

A grand jury issued an Indictment charging Terry Smith with four counts of lewd conduct with a minor, one count of sexual battery of a minor child sixteen or seventeen years of age, one count of sexual abuse of a minor under the age of sixteen, and one count of forcible sexual penetration by use of a foreign object. (R., pp.25-28.) All of the acts were allegedly perpetrated against his daughter, M.S., when she was between the ages of 12 and 16. (*See generally*, Transcript of Grand Jury Hearing held April 10, 2012).[1] Mr. Smith pled not guilty and the case proceeded to a jury trial. (R., pp.41, 82-84, 94-113.)

[1] A transcript of the grand jury proceedings is included as a confidential exhibit in this appeal. (R., pp.166-167.)

During the trial, the State presented the testimony of M.S. who described various sexual acts allegedly committed upon her by her father.[2] (Tr. 11/7/12, p.280, L.10 – p.380, L.2; Tr. 11/7/12, p.417, L.11 – p.436, L.17; Tr. 11/8/12, p.440, L.13 – p.567, L.15.) Regarding the alleged forcible penetration by the use of a foreign object allegation, M.S. testified that Mr. Smith moved her legs apart and inserted a rubber snake into her vagina when she was 11 or 12 years old. (Tr. 11/7/12, p.346, L.19 – p.347, p.5, p.352, L.13 – p.354, L.18.) Mr. Smith took the stand in his own defense and maintained that he did not in any way sexually touch his daughter.[3] (Tr. 11/13/12, p.14, L.1 – p.163, L.11.) A jury found Mr. Smith guilty of all seven charges. (R., pp.135-136.)

Mr. Smith continued to maintain his innocence throughout the presentence proceedings and during the sentencing hearing. (Tr. 1/23/13, 16, L.11 – p.28, L.25.) The State requested the court impose a total unified sentence of 30 years, with 10 years fixed, while Mr. Smith's counsel recommended a total unified term of 12 years, with 3 years fixed. (Tr. 1/23/13, p.15, Ls.4-7, p.26, Ls.10-18.) The district court imposed a unified sentence 20 years, with 10 years fixed, on each count to run concurrently.

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[2] Mr. Smith concedes that M.S.'s testimony regarding the other alleged sexual acts, which was presumably believed by the jury, was sufficient to sustain their finding that he was guilty of all of the counts other than the penetration by use of a foreign object charge.

[3] Although a total of 16 witness testified, including family members, family friends, friends of M.S., police officers, experts on sexual development and sexual abuse, and M.S.'s former school teachers (*See generally*, Trial transcripts), this is essentially a "he said / she said" case. These witnesses, some called by the State and some by the defense, provided evidence that can best be described as either circumstantial or impeaching and was generally designed either to corroborate or challenge the circumstances surrounding M.S.'s specific claims or to question her credibility. *Id.* None of these witnesses were either alleged to have, or claimed to have, seen any inappropriate or sexual contact between Mr. Smith and his daughter; therefore, the specifics of their testimony will not be presented in detail in this brief.

(R., pp.146-151; Tr. 1/23/13, p.33, Ls.13-17.) Mr. Smith filed a timely Notice of Appeal. (R., pp.155-158.)

ISSUES

1. Should this Court vacate Mr. Smith's conviction for unlawful penetration by a foreign object because there was insufficient evidence to support the conviction?

2. Did the district court abuse its discretion by imposing an excessive sentence?

ARGUMENT

I.

This Court Should Vacate Mr. Smith's Conviction For Unlawful Penetration By A Foreign Object Because There Was Insufficient Evidence To Support The Conviction

A. Introduction

The Idaho legislature has described three means by which the crime of forcible sexual penetration by a foreign object can be committed under Idaho Code § 18-6608: 1) against the victim's will by the use of force or the threat of force; 2) where the victim is incapable of giving lawful consent due to unsoundness of mind; and 3) where the victim is prevented from resisting due to an intoxicating, narcotic or anesthetic substance. I.C. § 18-6608. Mr. Smith was alleged to have violated this statute by accomplishing the penetration through the use of force, against M.S.'s will. He asserts that in order to sustain a conviction for forcible sexual penetration by use of a foreign object against the victim's will by the use of force, the State must demonstrate that the amount of force used must be more than the amount necessary to accomplish the act of penetration itself. Mr. Smith asserts that the State failed to show that he used any amount of force more than that necessary to accomplish the penetration; therefore, there was insufficient evidence to support his conviction for this count.

B. A Conviction Founded Upon Insufficient Evidence Violates A Defendant's Right To Due Process Of Law And Must Be Vacated

The Fourteenth Amendment to the United States Constitution prohibits the State of Idaho from depriving "any person of life, liberty, or property without due process of law." U.S. Const. Amd. XIV. "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a

man without evidence of his guilt." *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) (quoting *De Jonge v. State of Oregon*, 299 U.S. 353, 362 (1937) (additional citations omitted).) "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 433 U.S. 307, 314 (1979) (citations omitted).

The sufficiency of the evidence presented to sustain a conviction can be raised for the first time on appeal. *State v. Faught*, 127 Idaho 873, 877-878 (1995). "Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." *State v. Warburton*, 145 Idaho 760, 761-62 (Ct. App. 2008).

C. A Violation Of I.C. § 18-6608 Under The Use Of Force Theory Requires The State To Prove The Defendant Used An Amount Of Force Beyond That Necessary To Accomplish Penetration

Idaho Code § 18-6608 reads as follows:

> Every person who, for the purpose of sexual arousal, gratification or abuse, causes the penetration, however slight, of the genital or anal opening of another person, by any object, instrument or device, **against the victim's will by use of force or violence** or by duress, or by threats of immediate and great bodily harm, accompanied by apparent power of execution, or where the victim is incapable, through any unsoundness of mind, whether temporary or permanent, of giving legal consent, or where the victim is prevented from resistance by any intoxicating, narcotic or anesthetic substance, shall be guilty of a felony and shall be punished by imprisonment in the state prison for not more than life.

I.C. § 18-6608 (emphasis added). Mr. Smith asserts that because the statute requires both the use of "force or violence" and the penetration must be against the "victim's will," the quantum of force necessary under this statute must be that which is in some

appreciable measure greater than the amount of force necessary to commit the penetration itself. The Idaho Court of Appeals recent agreed with Mr. Smith's position, albeit in a case not yet final on appeal. *See State v. Elias*, 2013 Opinion No. 43, p.6 (Ct. App. July 12, 2013) (*petition for review pending*). The Idaho Court of Appeals held that,

> As with the forcible rape statute, section 18-6608 requires both an act that is against the will of the victim and the use of force; therefore, the force inherent in the penetration itself cannot be sufficient to uphold a conviction. Were it otherwise, the force element would be nullified.

Id. at 6.

The *Elias* Court based its decision on the Idaho Supreme Court's decision in *State v. Jones*, 154 Idaho 412 (2013), where the Court analyzed what is now Idaho Code § 18-6101(4),[4] the forcible rape statute. *Id.* at 5-7. Idaho Code § 18-6101(4) reads as follows:

> Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female under any one (1) of the following circumstances:
>
> (4) Where she resists but her resistance is overcome by force or violence.

I.C. § 18-6101(4). The *Jones* Court set out to determine whether the "intrinsic force" or the "extrinsic force" standard applies to the forcible rape statute. The Court cited to the definition of "extrinsic force" adopted by the Washington Court of Appeals in *State v. McKnight*, 774 P.2d 532, 538 (Wash. App. 1989), which stated,

> The *force* to which reference is made in forcible compulsion "is not the force inherent in the act of penetration but the force used or threatened to overcome or prevent resistance by the female." ... Where the degree of force exerted by the perpetrator is the distinguishing feature between second and third degree rape, to establish second degree rape the

[4] The statute in question was designated as I.C. § 18-6101(3) when Mr. Jones was charged but has since been renumbered as I.C. § 18-6101(4).

> evidence must be sufficient to show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration.

Jones, 154 Idaho at 421 (citing *McKnight* 774 P.2d at 535 (citations omitted)). The *Jones* Court further stated, "The intrinsic force standard, on the other hand, represents the more modern trend. It provides that any amount of force—even that which is inherent in intercourse—can substantiate a charge of rape." *Id.* Ultimately, the *Jones* Court held that, "based upon the plain language of I.C. § 18-6101[(4)] ... the extrinsic force standard applies in Idaho" to the force or violence language used in that statue. *Id.* at 422. The Court reasoned, "[w]ere we to construe "force" as encompassing the act of penetration itself, it would effectively render the force element moot. Force would *always* be present and never have to be proven, so long as there was sexual intercourse." *Id.*

Relying upon the *Jones* decision, the Court of Appeals held in *Elias*,

> Interpreting the statutes as such, we are constrained to apply the Supreme Court's adoption of the extrinsic force standard to section 18-6608. As with the forcible rape statute, section 18-6608 requires both an act that is against the will of the victim and the use of force; therefore, the force inherent in the penetration itself cannot be sufficient to uphold a conviction. Were it otherwise, the force element would be nullified.

Elias, 2013 Opinion 43, at 6. Although Mr. Jones recognizes that the *Elias* opinion is not yet final and, thus, cannot be currently cited as controlling authority, he asserts that the Court's analysis, based on upon the *Jones* decision, is persuasive. If, under I.C. § 18-6608, the force inherent in the act of penetration itself were sufficient, the "force" element would be a nullity - Idaho Courts generally will not interpret a statute in such a manner. *See Hecla Mining Co. v. Idaho State Tax Comm'n*, 108 Idaho 147, 151 (1995). Thus, Mr. Smith asserts that the "extrinsic force" standard applies to the "force or violence" language contained in I.C. § 18-6608 and, the quantum of force required to

sustain a conviction for forcible penetration by a foreign object must be in some appreciable degree greater than that which is merely inherent in, or incidental to, the act of penetration.

D. The State Presented Insufficient Evidence To Sustain A Jury Finding That Mr. Smith Used An Amount Of Force Greater Than The Amount Of Force Inherent In The Act Of Penetration Itself

During trial, M.S. had the following exchange with the prosecutor:

Q. And was there any other touching that occurred during that sixth grade year, with his body touching your body?

A. No.

Q. Did he touch your body with any objects during that year?

A. Yes.

Q. What did he touch you with?

A. A rubber snake?

Q. What do you mean when you say "a rubber snake"?

A. Like a toy snake.

Q. Can you give us a little more description? How long was this snake?

A. It was about like this long (indicating), maybe.

Q. So about a foot and a half, maybe?

A. Yeah.

Q. And what would he do with the snake?

A. He would put it in my vagina.

Q. How would that happen?

A. Can you rephrase?

Q. Sure. How was it that he would get the snake in your vagina? Like did he touch your body in any way?

A. He would move my legs apart and put it in.

Q. Now when he did that, this was during your sixth grade year?

A. Yes.

Q. About how often did that happen?

A. I'm not sure.

Q. Did it happen more than once?

A. Yes.

Q. Okay. Do you know if it happened more than, say, five times?

A. No.

Q. So between one and five times?

A. Yes.

Q. And you said that he would push your legs apart and insert the snake into your vagina?

A. Yes.

Q. When he did that activity, did he say anything to you?

A. No.

Q. Did you ask him any questions, that you can remember?

A. No.

Q. And was there any other type of touching that occurred during your sixth grade year?

A. No.

(Tr. 11/7/12, p.352, L.13 – p.354, L.18.) M.S.'s claim that Mr. Smith "would move" her legs apart (as she testified) or "would push" her legs apart (as M.S. acquiesced to upon the suggestion of the prosecutor) is simply not enough to meet the extrinsic force standard.

The *Jones* Court found that the defendant's acts of leaning on top of the victim, pushing her down to where she could not get up, pinning her hands underneath her so that she could not turn around, and pulling her underwear to the side, was sufficient to meet the extrinsic force standard because the amount of force used was more than that inherent in the act itself. *Jones* 154 Idaho at 422.[5] In contrast, the *Elias* Court found that where the victim suffered an abrasion to her "her labium inside the inner lips, roughly three centimeters in length" and felt pain associated with the digital penetration perpetrated against her, there was insufficient evidence of extrinsic force. *Elias*, 2013 Opinion No. 43 at 8-11. The evidence presented in this case is more akin to the evidence presented in *Elias* than the evidence presented in *Jones*. M.S. did not describe Mr. Smith physically removing any clothing, let alone taking any action to physically restrain her. The evidence presented in this case and presumably believed by the jury shows that Mr. Smith merely moved M.S.'s legs apart prior to accomplishing the penetration. Mr. Smith asserts that his actions do not meet the extrinsic force standard and, thus, his conviction for unlawful penetration by a foreign object should be vacated.

II.

The District Court Abused Its Discretion By Imposing An Excessive Sentence

Mr. Smith asserts that, given any view of the facts, his unified sentence of 20 years, with 10 years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will

[5] The Court did not determine whether or not the State proved extrinsic force in a separate count where the penetration occurred while the victim feigned being asleep, alternatively finding that the State failed to prove the resistance element of I.C. § 18-6101(3). *See Jones*, 154 Idaho at 422.

conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Smith does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Smith must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo,* 136 Idaho 138 (2001)).

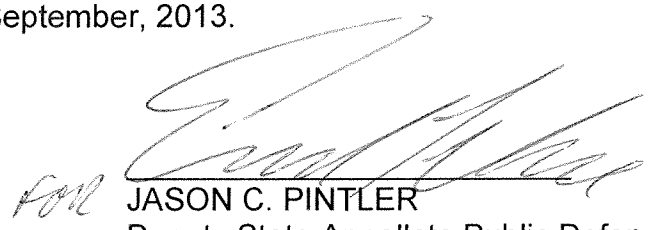
Mr. Smith enjoys the support of family and friends. His mother, Susan Smith, and family friends, Tina Laird, Jody Hosely, Lesa Ney, Marilee Steward, and Mary Friend and wrote letters stating their support for Mr. Smith. (Presentence Investigation Report (*hereinafter,* PSI), pp.184-192.) Susan Smith wrote that Mr. Smith has been a hard worker all of his life. (PSI, p.185.) Tina Laird described him as "very nice, caring, and would never hurt anyone" and both she and Marilee Steward described Mr. Smith as being a good person. (PSI, pp.187, 191.) Jody Hosely described Mr. Smith as "kind and considerate" while Lisa Ney described him as "honest and truthful." (PSI, pp.188-

190.) Finally, Mary Friend stated that she has known Mr. Smith since she was a child and that he would always keep an eye on her and keep her from harm's way. (PSI, p.192.) Idaho courts recognize that the support of family and friends is a mitigating factor that should be considered by the district court when determining an appropriate sentence. *See State v. Shideler*, 103 Idaho 593 (1982). Mr. Smith asserts that, in light of the strong support he enjoys from family and friends, the district court abused its discretion by imposing an excessive sentence.

CONCLUSION

Mr. Smith respectfully requests this Court vacate his conviction for unlawful penetration by a foreign object. Additionally, Mr. Smith respectfully requests that this Court reduce his sentence to a unified term of 12 years, with 3 years fixed, as recommended by his trial counsel at sentencing.

DATED this 17th day of September, 2013.



JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

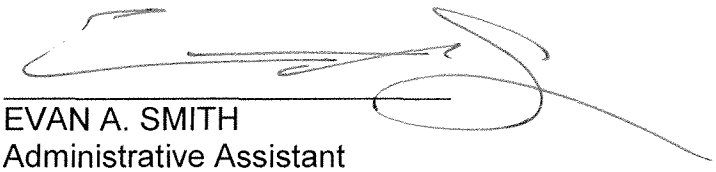
I HEREBY CERTIFY that on this 17th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

TERRY LIN SMITH
INMATE #63210
ISCI
PO BOX 14
BOISE ID 83707

PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

JEFFREY K SMITH
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

JCP/eas